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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 500

William S. Halpern and Louis N. Seltzer, *d/b as* BURLINGTON BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WEST JERSEY BROADCASTING COMPANY,
and
JOHN C. GIORDANO,
Receiver of the Assets of Mount Holly-Burlington Broadcasting Co., Inc.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WEST JERSEY BROADCASTING COMPANY IN OPPOSITION

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September 25, 1965

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OPINIONS BELOW

The original opinion of the Commission is reported at 34 F.C.C. 1135 (1963). The opinion of the court reversing and remanding for further proceedings, while retaining jurisdiction, is reported at 331 F.2d 774 (D.C. Cir., 1964), *cert. den.*, 379 U.S. 827 (No. 190, Oct. Term, 1964).

The Report and Recommendation of the Commission upon remand is not officially reported. It may be found, however, at 3 Pike & Fischer, Radio Regulation 2d, 863 (1964). The order of the court below denying the Commission's motion for a full remand and granting the motions of respondents West Jersey Broadcasting Company and John C. Giordano for affirmative relief is printed at pp. 11-12 of the petition for a writ of certiorari (Appendix A).

JURISDICTION

The order of the Court of Appeals remanding the case to the Commission and granting requests for affirmative relief was entered on March 17, 1965. Petitions for rehearing were denied by orders entered on May 28, 1965. The petition for a writ of certiorari was filed on August 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below acted within its express authority to control the scope of a reversed and remanded proceeding, under Section 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. 402(h), when it directed the Federal Communications Commission to admit new parties to a remanded proceeding in light of a default by one of the original parties.

STATUTE INVOLVED

The pertinent section of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*), *i.e.*, Section 402(h), 47 U.S.C. 402(h), is set out in the petition (p. 16, Appendix D).

STATEMENT

In a previous phase of these proceedings, the Court of Appeals for the District of Columbia Circuit heard and determined an appeal under Section 402(b) of the Com-

munications Act of 1934, as amended, 47 U.S.C. 402(b), from a decision by the Federal Communications Commission granting the application of John J. Farina, tr/as Mount Holly-Burlington Broadcasting Company (Farina) for a new standard broadcast station in Mount Holly, New Jersey and denying the mutually exclusive application of petitioner William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company (Halpern and Seltzer).[1] In a prehearing stipulation, the parties to the appeal had agreed that the following issues were presented for decision (J. App., p. 1):

> 1. Whether the Commission's findings and conclusions with respect to the financial qualifications of John J. Farina tr/as Mount Holly-Burlington Broadcasting Company and that applicant's representations relating thereto were supported by substantial evidence of record.
>
> 2. Whether the Commission's findings and conclusions with respect to the comparative merits of appellant and John J. Farina tr/as Mount Holly-Burlington Broadcasting Company were supported by substantial evidence of record.

The court, however, disposed only of the first issue stipulated. As to that issue, it found that "[t]he present record is inadequate for anyone to make valid conclusions." *William S. Halpern and Louis N. Seltzer d/b as Burlington Broadcasting Co. v. Federal Communications Commission*, 331 F.2d 774, 775 (D.C. Cir., 1964), *cert. den.*, 379 U.S. 827 (1964). Accordingly, it remanded "... for the development of a more adequate record ..." and specified the nature of the inquiry it required *(Ibid.)* It left the second issue set forth above undecided. However,

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[1] A third applicant, which had been preferred by the Hearing Examiner, failed to appeal and ceased thereafter to participate in the proceeding. See *Burlington Broadcasting Co.*, 34 F.C.C. 1135, 1148, 1191-1204 (1963).

in its Judgment of March 19, 1964, the court retained jurisdiction ". . . to dispose of the case when the record is returned following the proceedings on remand."

No stay pending appeal had been sought by petitioner. With Commission approval, Farina assigned his permit to a corporation owned and controlled by him, constructed his station and, on December 11, 1963, commenced operation.

Upon remand, the Commission designated the case for further hearing. However, in July, 1964, Farina informed the Commission that the assets of his company had been depleted by the proceedings herein, that a receiver had been appointed to conserve assets, and that, subject to the rights of his creditors, he would not prosecute the matter further. Also in July, the court-appointed receiver (respondent Giordano herein) filed an application with the Commission for the involuntary transfer of Farina's permit to him and sought the Commission's leave to intervene in the proceeding.

In September, 1964, the receiver informed the Commission that Farina had refused to testify voluntarily in the further proceedings. In the same month, respondent West Jersey Broadcasting Company (West Jersey) tendered an application for the facilities which had been authorized to Farina, requested the Commission to waive the lateness of this filing under its Rules, and urged the Commission to seek permission from the Court of Appeals to reopen the record for consideration of this new application.[2] This was also the course favored by respondent Giordano.

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[2] Respondent urged that in light of the comparative weakness of the Halpern and Seltzer application, the equities of innocent station employees and creditors and the public interest in continuing a meritorious service from a station located in Mount Holly (the Halpern and Seltzer proposal was for a station in Burlington rather than Mount Holly), Farina's default should not preclude consideration of alternatives to the Halpern and Seltzer application.

After further pleadings, on December 10, 1964, the Commission issued a Report and Recommendation to the court. In view of Farina's default, the Commission proposed to set aside its previous grant. Repeatedly stressing the equities accruing to Halpern and Seltzer because of their pursuit of a license for "nearly six years," the Commission rejected West Jersey's request. Instead, it proposed to grant petitioner's application. *Burlington Broadcasting Co.*, 3 Pike & Fischer, Radio Regulation 2d, 863, 870-71 (1964). [3]

Pursuant to this Report and Recommendation, the Commission filed a motion with the court below requesting a full remand of the pending appeal to permit issuance of a final decision carrying out the proposals it had made. Respondents West Jersey and Giordano sought leave to intervene in the pending appeal and lodged with the court pleadings which both opposed the Commission's motion for remand and requested affirmative relief pursuant to Section 402(h) of the Communications Act, 47 U.S.C. 402 (h). West Jersey sought a remand with directions that the Commission entertain new applications and hold comparative proceedings to determine which applicant should be granted the facilities involved. Respondent Giordano asked for the same relief and, in addition, for an order directing the Commission to grant the receiver's application for consent to the involuntary assignment of the Farina construction permit to him.

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[3] The Commission proposed to dismiss as moot receiver Giordano's application for involuntary assignment of the Farina permit to him. However, it authorized the receiver to continue operating the station involved ". . . pending the court's action with respect to this Report and Recommendation." It stated further that, assuming the court approved its proposed disposition and ". . . in light of whatever decision Halpern and Seltzer may reach on the question of a taking-over of the Mount Holly facility . . . ," it would ". . . consider further requests with respect to a continuity of service on the frequency." *Burlington Broadcasting Co.*, 3 Pike & Fischer, Radio Regulation 2d, 863, 871-72 (1964).

On March 17, 1965, a panel of the Court of Appeals, one judge dissenting, issued an order which granted respondents' motions to intervene, denied the Commission's motion for remand, granted respondents' motions for affirmative relief under Section 402(h) and remanded the case to the Commission ". . . with directions to: (1) reopen the record; (2) accept the application of West Jersey Broadcasting Company and any other qualified applicant for the facilities here involved; (3) allow intervention by the aforesaid receiver, and (4) hold new comparative proceedings to determine which applicant is best qualified to be awarded said facilities." See Pet., p. 12 (Appendix A).[4]

A petition for rehearing *en banc* filed by Halpern and Seltzer was denied on May 28, 1965, three judges dissenting. Petitions for rehearing addressed to the panel which had issued the order in question, filed by the Commission and by Halpern and Seltzer, were denied on the same day, one judge dissenting.

ARGUMENT

1. None of the grounds for the grant of a writ of certiorari which are specified in Rule 19 of the Rules of this Court is present here. The primary ground advanced by petitioner is an asserted conflict between the action below and decisions of this Court which hold that Congress has generally committed the procedure to be followed in the grant or denial of radio licenses to the discretion of

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[4] Petitioner states that the Court of Appeals also directed the Commission to grant the application for assignment to the receiver. (Pet., p. 5.) The only possible ground for this statement is the fact that the court granted the receiver's request for affirmative relief. Since, however, the court below proceeded to spell out the respects in which it was granting affirmative relief, omitting any such direction to the Commission, petitioner's statement is without foundation.

the Commission.[5] The court below acted, however, under the special provisions of Section 402(h) of the Act, which impose upon it the duty of controlling the scope of Commission proceedings following a reversal and remand. The decisions on which petitioner relies do not reach the only issue presented here, *viz.*, the proper exercise by a reviewing court of its duties under these provisions. They deal rather with the general standards for review of Commission actions which take place prior to any judicial examination — much less reversal and remand.[6] Thus, the asserted conflict does not exist. Nor is there any other reason for further review by this Court.

2. The action below was explicitly grounded upon Section 402(h) of the Act, which provides that, where the

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[5] See Pet., p. 6, fn. 6, citing *Federal Communications Commission v. Taft B. Schreiber*, 381 U.S. 279, 289 (1965); *Federal Communications Commission v. WJR, the Goodwill Station, Inc. et al.*, 337 U.S. 265, 272 (1949); *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 333 (1945).

[6] *Schreiber* deals with the review by a Federal district court, upon application for enforcement of a Commission subpoena, of Commission decisions whether to treat particular testimony and evidence in a broad, quasi-legislative investigation as confidential. *WJR*, at the page cited, deals with the review by a Court of Appeals of the Commission's decision whether to postpone action on a particular application pending resolution of a potentially related rulemaking proceeding; in addition, *WJR* treats the Commission's discretion in deciding whether to hear oral argument on a petition alleging that the grant of an application will, because of the electronic interference thus caused, affect the license rights of an existing station (337 U.S. at 274-85). *Ashbacker* deals with the question of whether the Communications Act requires the Commission to give co-pending mutually exclusive applications a contemporaneous and comparative hearing. At the page cited by petitioner, a footnote suggests that the Commission has the discretion to establish by rule filing dates which determine whether one application is to be considered together with another, previously filed and mutually exclusive application (326 U.S. at 333, fn. 9).

reviewing court reverses and remands, the Commission must restrict its attention to the existing record "...unless otherwise ordered by the court. . . .".[7] This provision was inserted into the Act by the Congress for the express purpose of revising the rule previously enunciated in *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940). In *Pottsville*, this Court stated generally that Commission procedures were a matter of Commission discretion (309 U.S. at 138). On this basis, it held that the Court of Appeals for the District of Columbia lacked power to prevent the Commission from reopening the record to consider new applicants, after the agency's prior decision had — as here — been reversed and remanded for further proceedings (309 U.S. at 145).

The Court further held that no right of priority for earlier filed applications could be inferred from "...the curtailed review allowed by the Communications Act..." (309 U.S. at 145). For "[s]uch an implication ... is at war with the basic policy underlying the statute," which makes "... the public interest..." rather than "... the contingencies of judicial review and litigation..." decisive in the granting of applications (309 U.S. at 145-46).

Section 402(h) was a direct response to the *Pottsville* decision.[8] The Congress did not create any right of pri-

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[7] Petitioner suggests some doubt whether the Court of Appeals in fact purported to act under Section 402(h) (Pet., p. 7). As the Statement above notes, however, the court not only "adverted" to the ". . . requests for affirmative relief pursuant to Section 402(h). . ." filed by respondents West Jersey and Giordano (intervenors below) but explicitly granted ". . . the aforesaid intervenors' request for affirmative relief. . . ." See the order of March 17, 1965, Pet., p. 11 (Appendix A).

[8] Section 402(h) stems from the Communications Act, Amendments, 1952, § 14, 66 Stat. 720 (1952). Like many other provisions of those amendments, however, it originated in H.R. 5497, 77th Cong. (1942). See H. Rep. No. 1750, 82d Cong., 2d Sess., p. 1 (1952). The section was explicitly proposed as a

(*continued on following page*)

ority for earlier filed applications, as against others tendered after a reversal and remand. It decided, rather that when a finding of agency error is made, the reviewing court (instead of the agency) should determine the scope of the remanded proceeding. As the Senate Committee reporting on the relevant bill remarked (Sen Rep. No. 44, 82d Cong., 1st Sess., p. 12 (1951)):

> Subsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceedings to review. *The committee points out that under the language of this subsection the appellate court would have ample authority either on its own motion or upon the petition of the Commission or any other litigant, to provide, either as part of its original decree or supplementary thereto, that new parties and new issues may be introduced and a new record made after remand to the Commission.* This authority stems from the phrase "and unless otherwise ordered by the court." (Emphasis added.)

The present case falls squarely within Section 402(h). There was an appeal from a Commission decision, a finding of error and a remand to the agency. Events

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(*footnote* 8 *continued from preceding page*)
means of overturning the *Pottsville* decision, and was opposed by the Commission on the ground that *Pottsville* represented sound policy. See Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess. on H.R. 5497, pp. 88-90, 816-19, 959-61 (1942). For the subsequent history of this provision, see, *inter alia*, Hearings before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. on S. 814, pp. 946-47 (1943); Hearings before a Subcommittee on the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d Sess. on S. 1333, pp. 67, 87 (1947); Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. on S. 658, pp. 103-04, 282, 359 (1951); Sen. Rep. No. 44, 82d Cong., 1st Sess., p. 12 (1951); H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17 (1952).

flowing from the reversal and remand persuaded the court below, upon the petitions of litigants in the case, that the record should be reopened for consideration of new applicants. The court's order was within the letter and the spirit of the statute. It did not, therefore, invade any province reserved to the Commission's discretion. Nor did it conflict with the decisions on which petitioner relies, which — insofar as they are material here — merely follow the general rule concerning agency discretion announced in *Pottsville*.[9]

3. No other ground for review is argued by petitioner,[10] and none exists. The correctness of the court's exercise of its jurisdiction under Section 402(h) presents no issue for review. The general policy of the Act remains as it was declared to be in *Pottsville*. The public interest, rather than the contingencies of litigation, must be the decisive factor in determining which of several applications is to be granted. Petitioner makes no claim that the court below reached an incorrect result under this policy.

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[9] See *Federal Communication Commission v. Taft B. Schreiber*, 381 U.S. 279, 289-91 (1965); *Federal Communications Commission v. WJR, The Goodwill Station, Inc. et al.*, 337 U.S. 265. 272, 283 (1949).

[10] Petitioner does claim that the court's action was contrary to Section 402(g) of the Act, 47 U.S.C. 402(g) (Pet., p. 8). But this section, which makes the standards for review of administrative action embodied in Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), applicable to the hearing and determination of appeals from licensing actions of the Commission, adds nothing to petitioner's case. The standards of review to which Section 402(g) refers are defined and explained, insofar as review of the actions of the Commission is concerned, by the decisions of this Court on which petitioner relies. Since those decisions are not applicable to the action below, the standards they define are likewise inapplicable. The court below was not engaged in the hearing and determination of an appeal pursuant to Section 402(g). Rather, having heard and partially determined an appeal, it was disposing of ancillary motions under the explicit provisions of Section 402(h).

4. The factual and jurisdictional setting in which the order below was issued is so specialized as to be virtually unique. The instances in which a broadcast applicant is successful in obtaining a grant and then defaults after a reversal and remand are indeed few. This case is limited further by reason of the fact that the order of which petitioner complains came at a point when the appellate process was incomplete. Having determined only one of the two issues presented to it by petitioner's appeal, the court — as we have noted — retained jurisdiction notwithstanding its remand. Because of this retention of jurisdiction, the Commission did not think it appropriate to issue a final and effective decision upon remand. Instead, it issued a Report and Recommendation to the court, and moved for a full remand to permit the issuance of a final decision. The Court of Appeals was thus faced both with the question of the appropriate scope of proceedings in a case which had been reversed and remanded and with the question of whether an appeal still pending before it should be remanded to the agency in light of after-occurring events. *Cf. Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364 (1939); *Fleming v. Federal Communications Commission*, 225 F.2d 523 (D.C. Cir., 1957). In these circumstances, the considerations appropriate to its action and the nature of the action it could take were of a highly special and rarely recurring kind.

Petitioner suggests that related questions are presented by the pending petition for certiorari in *Mid-Florida Television Corp. v. Federal Communications Commission* (No. 204), filed June 1, 1965 (Pet., p. 8, fn. 9). In addition, the petitioner in *Florida - Georgia Television Co., Inc. v. Federal Communications Commission* (No. 590), filed September 20, 1965, has suggested that the action below in this proceeding may rest on a belief by the court that Section 402(h) grants "... a new statutory authority to exercise a policy supervision over the Commission," that such a view may form the basis

of the court's action in *Florida - Georgia* and that — if this avowed "speculation" is correct — the two cases are related *(Florida - Georgia* Pet. pp. 18-22).

There is, to be sure, one common factor in the three proceedings.[11] In both *Mid-Florida* and *Florida - Georgia* the court below has directed the Commission to reopen broadcast licensing proceedings for the consideration of new applications, as it has done here. In neither *Mid-Florida* nor *Florida - Georgia*, however, was there a reversal of an agency decision because of an error independent of the failure to reopen and a remand (coupled with retention of jurisdiction), followed by events which persuaded the court, upon motions by litigants, that new applications should be considered. Neither, in brief, involves the fundamental problem at which Section 402(h) is aimed, *i.e.*, the proper scope of a licensing proceeding when there has been a reversal and remand.[12] Nor

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[11] The similarity urged by the petitioner in *Florida - Georgia*, however, *i.e.*, that in all three cases the court below has exceeded its proper jurisdiction on review, might be urged of any petitions seeking review of actions by the court below in the course of, or ancillary to, a review of Commission actions.

[12] Both *Mid-Florida* and *Florida - Georgia* do involve, on the other hand, a question wholly absent in this case, *i.e.*, the action required of the Commission and the role of the reviewing court in cleansing a licensing proceeding of the taint injected by improper *ex parte* approaches to members of the agency. Such attacks upon the integrity of the agency's judgments necessarily bring into play extraordinary jurisdictional and procedural rules. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-50 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3d Cir., 1948), *cert. den.*, 335 U.S. 912 (1949); *Massachusetts Bay Telecasters, Inc. v. Federal Communications Commission*, 261 F.2d 55 (D.C. Cir., 1958), *cert. den.*, 366 U.S. 918 (1961), 295 F.2d 131 (D.C. Cir., 1961); *WKAT, Inc. v. Federal Communications Commission*, 296 F.2d 375 (D.C. Cir., 1961), *cert. den.* 368 U.S. 841 (1961); and see this Court's order of October 27, 1958 in the *Mid-Florida* proceeding, which takes the extraor-

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does either involve the question of whether a case should be remanded to an agency in light of events occurring subsequent to the filing of an appeal. *Cf., Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364. Thus, neither the problem with which the Court of Appeals dealt here nor the jurisdictional and procedural ambit in which it moved bears more than a superficial resemblance to those involved in *Mid-Florida* and *Florida - Georgia*.[13]

(*footnote* 12 *continued from preceding page*)
dinary action of vacating on the Court's own motion a prior judgment of the Court of Appeals affirming the Commission, and remanding for consideration in light of testimony before a Congressional committee which suggested that improper conduct had occurred (reported *sub nom., WORZ, Inc. v. Federal Communications Commission*, 358 U.S. 55 (1958)).

[13] The petitioner in *Florida - Georgia*, having assumed the relevance of the order in this proceeding to its case, urges that Section 402(h) cannot be construed to authorize the action below without conferring upon the reviewing court the power to make "administrative decisions," thus raising questions of "constitutional magnitude" or, in any event, questions of this Court's power to review, under the rule of *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930) and like cases. (Florida - Georgia Pet., pp. 20-21.) This attempt to raise constitutional issues rests on the abstract premise that any addition whatever to the pure function of laying bare errors of law in agency decisions must necessarily constitute an "administrative function," inappropriate for a constitutional court. But an order requiring the Commission to consider a competing application can hardly be "administrative," in light of this Court's imposition of just such a requirement in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327 (1945). In any event, the limited ancillary order issued here, controlling the scope of a proceeding which had been reversed and remanded, is no more "administrative" than an order staying the effectiveness of a Commission action pending appeal (*Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4 (1942)) or an order remanding without deciding the merits of an appeal ". . . where justice demands that course in order that some defect in the record may be supplied." *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 373

(*continued on following page*)

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 25, 1965

(*footnote* 13 *continued from preceding page*)
(1939). Indeed, as we have noted, the court below, in disposing of the Commission's motion for a full remand, was deciding under the doctrine of *Ford* whether justice demanded a remand on the terms requested by the Commission. Its order, like the order affirmed in *Ford*, did not seek to control the results of an agency's exercise of discretion. Rather, like the order affirmed in *Ford*, it directed the agency's attention to a matter upon which it was to exercise its discretion. The order below, therefore, ". . . does not encroach upon administrative functions." (305 U.S. at 374.)

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REPLY BRIEF FOR PETITIONER

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STATUTE

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REPLY BRIEF FOR PETITIONER

The briefs for Respondents in opposition put into clear focus the nature and importance of the principal question presented in the Petition for *Certiorari*: The proper interpretation of Section 402(h) of the Communications Act of 1934, 47 U.S.C. 402(h). For, it is conceded by Respondents that the decision of the court below is in conflict with earlier decisions of this court, such as the recent decision in *FCC v. Schreiber*, 381 U.S. 279, 14 L.ed. 383, which reaffirmed the established principle that courts of law will not interfere with procedural matters which are entrusted to the discretion of administrative agencies.

Respondents assert, however, that the decision of the court below was grounded upon Section 402(h) and that the Court of Appeals merely exercised the power, granted by that section, to control the scope of the Commission's procedures. The Respondents are evidently not in agreement, however, with respect to the type of case or the circumstances in which this power may be exercised. In this reply we deal first with the delineation of the character of the power Respondents assert has been granted the Court of Appeals under Section 402(h) and then with the question as to when that power may be exercised.

Petitioner and Respondents are agreed that Section 402(h), enacted in 1952, was intended to modify the decision of this Court in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The question in *Pottsville* was whether the Circuit Court of Appeals, upon setting aside (for error of law) the Commission's denial of an application to construct a radio station, could upon remanding the application to the Commission, require the Commission to consider the application on the basis of the record as originally made instead of considering it together with subsequently filed rival applications. Answering in the negative, this Court emphasized that the supervisory functions of the Court of Appeals are purely judicial. In its opinion, this Court stressed that the decision whether the grant of a broadcasting license would serve the public convenience and necessity had been entrusted by the Congress to the Commission; and that the subordinate questions of the procedures to be followed in ascertaining the public interest — questions such as "the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions — were explicitly and by implication left to the Commission's own devising, so long, of course, as it observed the basic requirements designed for the protection of private as well as public interest," *Id.* at 138. Further, this court

stated: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Id.* at 145. To the argument that such re-opening of the record would result in delay and hardship and might deprive the original applicants of priority rights, as against later applicants, this Court answered that Congress had not conferred such priorities and that a Congressional remedy was available. *Id.* at 145, 146.

Section 402(h) unquestionably modified the holding of *Pottsville*. The issue presented here is how extensive a modification was made. Section 402(h) provides:

> "In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

There is no disagreement that as a result of this amendment the Commission is no longer free, following a reversal and remand by the Court of Appeals, to reopen the record without authorization by the court, either for the taking of additional evidence or for the consideration of new applications for the same or a mutually exclusive facility. The primary purpose of 402(h) was to secure the fruits of victory to the appellant who succeeded in upsetting the denial of his application or a grant to a competitor.

There is disagreement, however, about the meaning of the phrase "unless otherwise ordered by the court." Petitioner's view is that this phrase was not designed to modify the traditional standard of judicial review, namely,